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Division II  
State of Washington

No. 50430-8 II

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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PUGET SOUND ADVOCATES FOR RETIREMENT ACTION; M.G.;  
T.S. ON BEHALF OF S.P.; and E.S. ON BEHALF OF R.S.; and  
SEIU 775, a labor organization,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES; and SEATTLE TIMES COMPANY,

Respondents.

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**OPENING BRIEF OF APPELLANTS**

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## I. INTRODUCTION

Thousands of functionally disabled Washingtonians receive in-home care services from Individual Providers under Washington State's Medicaid program. Functionally disabled persons are often targets for identity theft and fraud. At issue in this case is whether the Department of Social and Health Services ("DSHS") should fulfill the Seattle Times Company's ("Seattle Times") (collectively, "Respondents") request for a list of Individual Provider names and birthdates under the Public Records Act ("PRA"). The answer to that question is "no".

While this case has been pending on appeal, this Court held that Article I, Section 7 of the Washington Constitution forbids the state from producing the exact Information requested by the Seattle Times here. *Wash. Pub. Emp. Ass'n v. Freedom Foundation*, No. 49224-5-II, 2017 WL 4899471, at \*1 (Wash. Ct. App. Oct. 31, 2017) ("WPEA"). This is because disclosing names associated with birthdates of public employees would leave them "subject to an **ongoing risk** of identity theft and other harms." *Id.* at \*4 (emphasis in original). For this reason alone, Appellants respectfully request this Court reverse.

This Court should also reverse because Initiative 1501 (the "Act") prohibits disclosure. The Act exempts sensitive personal information of vulnerable individuals, including Individual Provider names, from

production under the PRA in order to protect against potential identity theft, fraud, and other harms. RCW 42.56.640(1). In passing the Act with an almost 71% “yes” vote, Washington voters made clear their intent to implement a strong public policy of protecting the privacy of functionally disabled individuals and their caregivers. The Seattle Times submitted its PRA request after voters approved the law, but before it technically went into effect. Applying the Act retroactively to the narrow and limited circumstances of the Seattle Times’ request furthers the voters’ intent in enacting the law.

Finally, independent of the Act’s PRA exception, the Act separately and affirmatively prohibits the state from disclosing Individual Provider names in all circumstances unless a statutory exception applies. RCW 43.17.410. Irrespective of retroactivity, the state is thus prohibited from disclosing Individual Provider names at any point in time—the timing of the PRA request is irrelevant. Ignoring this statutory prohibition and the voters’ intent in passing the Act, the trial court erroneously held the Act did not apply to the Seattle Times’ PRA request.

For any or all of these reasons, Appellants respectfully request this Court reverse and permanently enjoin DSHS from disclosing the list of Individual Provider names and birthdates.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Appellants' motion for a permanent injunction.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether this Court's holding in *WPEA* that disclosing names associated with birthdates of public employees in response to a PRA request violates Article I, Section 7 of the Washington Constitution prohibits the state from releasing the names and birthdates of Individual Providers requested here.

2. Whether the Act's strongly stated purpose of protecting vulnerable individuals and their caregivers would be served by applying the Act retroactively to a request made after the people passed the Act, but before its technical effective date.

3. Whether RCW 43.17.410 prohibits the state from releasing the Individual Provider names and birthdates today, regardless of the presence of a PRA request.

## **IV. STATEMENT OF THE CASE**

### **A. Appellants receive in home-care services from Individual Providers**

The individual Appellants have a broad range of functional and developmental disabilities that result in them receiving in-home care services from Individual Providers under Washington State's Medicaid

program. CP 35-40; RCW 74.04.050; RCW 74.09.500. Such services may include feeding, bathing, medication management, and other physical or verbal assistance with activities of daily living. RCW 74.39A.009(19); WAC 388-106-0010. Individual Providers are often family members—adult children caring for their elderly parents; mothers and fathers caring for their functionally disabled child; and siblings caring for one another. See CP 35-40 (identifying mothers, fathers, and a twin brother as the Medicaid recipients’ Individual Providers). These services make it possible for disabled persons to remain in their own homes. *Id.*

None of the Appellants who receive in-home care services want the identities of their Individual Providers publicly disclosed. CP 34, 36, 38, 40. This includes the individual Appellants as well as Appellant Puget Sound Advocates for Retirement Action, which has members that receive services from Individual Providers or are Individual Providers themselves. CP 41-42.

Similarly, Appellant SEIU 775 seeks to prevent the public disclosure of Individual Providers’ names and birthdates. SEIU 775 is a labor organization that represents its approximately 34,000 members who are Individual Providers. CP 42. Pursuant to RCW 74.39A.270 and Chapter 41.56 RCW, SEIU 775 is the exclusive bargaining representative for all Individual Providers residing in the State of Washington. *Id.*

**B. Washington voters prohibit the disclosure of Individual Provider names by passing the Act**

In the November 2016 General Election, voters passed I-1501, titled the “Seniors and Vulnerable Individuals’ Safety and Financial Crimes Prevention Act,” by almost a 71% “yes” vote. CP 184. The Act’s stated intent is to “protect the safety and security of seniors and vulnerable individuals,” including functionally disabled persons who receive services from Individual Providers. Laws of 2017, ch. 4, § 2. The Act declares names of Individual Providers “sensitive personal information of in home caregivers for vulnerable populations.” RCW 42.56.640(1), (2).

The Act’s purpose of protecting seniors and vulnerable individuals is advanced, in relevant part, by two separate statutory provisions that bar disclosure of Individual Provider names. First, RCW 42.56.640(1) exempts names of Individual Providers from production under the PRA. Second, RCW 43.17.410 specifically prohibits disclosure of Individual Provider names in any circumstance (unless a statutory exception applies), mandating that “neither the state nor any of its agencies shall release . . . sensitive personal information of in-home caregivers for vulnerable populations.” The Act states that such measures promote the public policy of preventing abuse of vulnerable populations by “identity theft, consumer fraud, and other forms of victimization.” Laws of 2017, ch. 4, § 12. In

all, the Act declares its policy of protection of vulnerable individuals six times and requires that the Act be “liberally construed” to promote that policy. RCW 9.35.001(2); RCW 43.17.410(1); Laws of 2017, ch. 4, §§ 2, 7, 9, 12. The Act’s effective date was December 8, 2016. CP 142.

### **C. Procedural History**

Nearly one week after voters passed the Act, the Seattle Times sent a PRA request to DSHS for “[a] list of current individual providers (also known as state paid caregivers) and their dates of birth from the Aging and Long-term Support Administration.” CP 47. DSHS informed the Seattle Times that it would provide the records on December 9, 2016. CP 96-97.

To ensure their privacy interests were protected, Appellants moved for—and successfully obtained—a temporary restraining order enjoining DSHS from disclosing the names of Individual Providers. CP 63-65. Appellants then moved for a preliminary injunction. CP 70-82. After oral argument, the trial court granted Appellants’ motion and preliminarily enjoined DSHS from fulfilling the PRA request. CP 170-71.

Appellants then moved for permanent injunctive relief. CP 180-193. Despite acknowledging the Act “is clearly designed to protect [Individual Provider] information” from being disclosed, the trial court concluded that the Act “was not in effect” at the time the PRA request was made and declined to apply the Act retroactively. Report of Proceedings

(“RP”) (June 9, 2017) at 22:8-19. Consequently, the trial court denied Appellants’ motion for permanent injunctive relief, but stayed its decision until June 29, 2017. CP 211-12. Appellants then filed a notice of appeal. CP 213.

On June 22, 2017, Appellants filed an emergency motion for stay and injunctive relief and motion for expedited consideration in this Court. This Court granted a temporary stay the next day. Ruling by Commissioner Bearse (June 23, 2017). On July 3, this Court enjoined DSHS from disclosing Individual Provider names pending appeal. Ruling by Commissioner Schmidt (July 3, 2017).

On October 31, 2017, the Washington Court Appeals in *WPEA* held that Article I, Section 7 of the Washington Constitution forbids state agencies from disclosing state employees’ names associated with birthdates in response to PRA requests. *WPEA*, 2017 WL 4899471 at \*1.

## **V. ARGUMENT**

This Court should reverse for three independent reasons. First, this Court’s recent holding in *WPEA*—that the disclosure of Individual Provider names associated with birthdates violates constitutional privacy rights—controls here. Second, the trial court erred by ignoring that the Act’s strong public policy of protecting vulnerable populations would be furthered by applying the Act retroactively to requests for Individual

Provider names and birthdates submitted after the Act passed. Third, the trial court erred by ignoring the Act's statutory prohibition against releasing such information, which applies irrespective of the timing of a PRA request.

**A. Standard of Review**

The trial court's denial of permanent injunctive relief under the PRA is reviewed de novo. See *King Cty. Dep't of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 351, 254 P.3d 927 (2011). Under the PRA, a party can prevent the disclosure of public records by seeking injunctive relief. *Ameriquist Mortg. Co. v. Office of the Attorney Gen. of Wash.*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013). To obtain injunctive relief, the party must show "(1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function." *Id.*; RCW 42.56.540.<sup>1</sup> Because Appellants satisfy all three factors, this Court should reverse.<sup>2</sup>

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<sup>1</sup> Appellants rely on the injunctive relief standard articulated in RCW 42.56.540. As noted by this Court, no case has applied the three-part test generally required to obtain permanent injunctive relief to RCW 42.56.540, which governs third-party PRA actions. *SEIU Healthcare 775NW v. State*, 193 Wn. App. 377, 393, 377 P.3d 214 (2016). To obtain relief under the general test, a party must establish (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the act complained of will result in actual and substantial injury. *Id.* (citing *Huff v. Wyman*, 184 Wn.2d 643, 651, 361 P.3d 727 (2015)). This Court has reconciled any apparent discrepancy between the general test and RCW 42.56.540 by noting that "the first two requirements for a permanent injunction [under the general test] relate to the existence of

To protect confidential information, the PRA exempts various records from public disclosure. The PRA also exempts from public disclosure any information protected by any “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). “An ‘other statute’ that exempts disclosure does not need to expressly address the PRA, but it must expressly prohibit or exempt the release of records.” *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 372, 374 P.3d 63 (2016). Here, the Act specifically exempts from the PRA sensitive personal information, *see* RCW 42.56.640(1), and separately prohibits disclosure of such information in an “other statute”, *see* RCW 43.17.410.

**B. Disclosure of the Requested Records Would Violate Appellants’ Constitutional Privacy Rights**

DSHS is prohibited from releasing the names and birthdates of Individual Providers because the privacy rights guaranteed by Article I,

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an exemption and the third requirement is consistent with a similar requirement in RCW 42.56.540.” *Id.* at 393; *see also Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190 (2011) (holding that RCW 42.56.540 controls injunctions under the PRA because it is more specific than RCW 7.40.020, which codifies the court’s general powers to grant an injunction).

<sup>2</sup> In response to Appellants’ motion for a permanent injunction, Respondents did not contest the first or third factors. Thus, the only issue on appeal is the second factor—whether an exemption applies. *See State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (argument not raised at trial waived on appeal).

Section 7 of the Washington Constitution forbid disclosure. *WPEA*, 2017 WL 4899471 at \*1.<sup>3</sup>

Washington’s Constitution may exempt certain records from production under the PRA because the Constitution supersedes contrary statutory laws. *Id.* at \*3. Pertinent here, Article I, Section 7 extends privacy rights to Washingtonians, declaring that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>4</sup> Const. art. I, § 7. Reaffirming these privacy rights, this Court recently held that Article I, Section 7 protects state employees’ full names associated with their corresponding birthdates from public disclosure. *WPEA*, 2017 WL 4899471 at \*1.

In *WPEA*, the Freedom Foundation submitted PRA requests to various state agencies requesting disclosure of “union represented employees’ full names, birthdates, and work email addresses.” *Id.* Finding state employees have a constitutionally protected privacy interest

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<sup>3</sup> Although *WPEA* was decided while this appeal was pending, manifest error affecting a constitutional right may be raised for the first time on appeal. *See* RAP 2.5(a) (stating that a party may raise a “manifest error affecting a constitutional right” for the first time on appeal). An error is “manifest” if it “is truly of constitutional magnitude.” *State v. Scott*, 110 Wn. 2d 682, 688, 757 P.2d 492 (1988). Here, the trial court’s ruling constitutes manifest error because it permits a constitutional violation of Individual Providers’ privacy rights.

<sup>4</sup> Courts’ decisions on constitutional matters generally apply retroactively. *See Shandola v. Henry*, 198 Wn. App. 889, 900-01, 396 P.3d 395 (2017) (stating new civil decisions generally apply retroactively because “[t]he default of retroactive application is overwhelmingly the norm”) (citation and quotation omitted).

in their names associated with birthdates, this Court stated that disclosing such information would reveal “intimate and discrete details of the employees’ lives,” and such an involuntary disclosure of personal information would leave employees “subject to an **ongoing risk** of identity theft and other harms.” *Id.* at \*4 (emphasis in original). This Court further explained that “the purpose of the PRA is not served by the public disclosure of this information.” *Id.* at \*5.

Under *WPEA*, DSHS is prohibited from releasing Individual Provider names and birthdates in response to the Seattle Times’ PRA request. Individual Providers are paid by DSHS and, like the public employees in *WPEA*, entitled to the privacy protections guaranteed by Article I, Section 7. *See* RCW 74.39A.270(1) (identifying Individual Providers as public employees for purposes of collective bargaining); *see also SEIU Healthcare 775NW v. State, Dep’t of Soc. & Health Servs.*, 193 Wn. App. 377, 385–86, 377 P.3d 214 (2016) (“One of the Foundation’s central purposes is to educate public employees, including the individual providers,....”). Disclosing Individual Providers’ names associated with birthdates would put them at “risk of their private affairs and intimate details being exposed to the public”, in violation of their constitutional rights. *WPEA*, 2017 WL 4899471 at \*3. On this basis alone, this Court should reverse.

**C. The Act Prohibits DSHS from Disclosing Individual Provider Names Because the Act’s Exemption for Sensitive Personal Information Applies Retroactively**

Although this Court need not reach the question of whether the Act applies retroactively given its holding in *WPEA*, DSHS should nonetheless be prohibited from fulfilling the Seattle Times’ PRA request submitted after the Act passed, but before its effective date.

**1. Voters intended the Act to put a hard stop to disclosing Individual Provider names**

Three separate bases exist to apply a law retroactively: the voters so intended, the law is curative,<sup>5</sup> or the law is remedial.<sup>6</sup> *See McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 324-325, 12 P.3d 144 (2000) (citing *State v. Cruz*, 139 Wn.2d 186, 191, 985 P.2d 384 (1999)). Here, Appellants rely solely on the first basis: that voters intended to prohibit state agencies from disclosing Individual Provider names. *See Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 302-03, 174 P.3d 1142 (2007).

The Supreme Court has noted that evidence of intent to apply a law retroactively is not restricted to the law’s “express language.” *In re F.D.*

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<sup>5</sup> Curative statutes must clarify or technically correct an ambiguous statute. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006) (citation and quotation omitted).

<sup>6</sup> Remedial statutes must relate to practice, procedure, or remedies. *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984).

*Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.3d 1303 (1992) (noting that the legislation at issue was “silent” on retroactivity before proceeding with retroactivity analysis). Thus, even though the Act does not expressly state that it applies retroactively, the Act’s purpose and language show that voters intended it to do so. Indeed, the whole point of courts’ retroactivity analysis is to determine whether retroactivity applies despite the fact that the applicable law is silent on the matter.

To determine whether voters intended a law to apply retroactively, courts consider the Act’s purpose and language. *McGee Guest Home*, 142 Wn.2d at 325. Intent may also be discerned from “a legislative statement of a strong public policy that would be served by retroactive application” or from any other reliable indicator. *City of Ferndale v. Friberg*, 107 Wn.2d 602, 605, 732 P.2d 143 (1987); *State v. Sup. Ct. for Thurston Cty.*, 168 Wash. 361, 364, 12 P.2d 394 (1932) (stating that the intent of an act may be discerned by the title of an initiative measure) (citation omitted)). Even when “the most appropriate language was not used,” it is “the court’s duty to give effect to the legislative intent[.]” *See Snow’s Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 292, 494 P.2d 216 (1972). For initiatives, the intent of the voters is determinative. *State v. Rose*, 191 Wn. App. 858, 869, 365 P.3d 756 (2015), *review denied*, 185 Wn.2d 1030

(2016). The language of an initiative is construed as an average voter would read it. *Id*

In *State v. Rose*, this Court found that Initiative 502 (“I-502”), which decriminalized marijuana in Washington State, applied retroactively to pending prosecutions because the voters so intended. *Id.* at 861. Even though I-502 did not contain express language of retroactivity, this Court applied the above-discussed retroactivity analysis and found that voters intended to apply the law retroactively. *Id.* In finding intent, this Court considered various factors, including: I-502’s provisions; I-502’s context “as a whole”; I-502’s title; and statements made about I-502 in the Voters’ Pamphlet. *Id.* at 869. Here, several similar factors show that Washington voters intended the Act to put a hard stop to disclosing Individual Provider names.

First, that voters intended to do so is evidenced by the Act’s stated intent: “It is **the intent** of [the Act] to **protect** the safety and security of **seniors and vulnerable individuals** by ... **prohibiting the release of certain public records** that could facilitate identity theft and other financial crimes against seniors and vulnerable individuals.” Laws of 2017, ch. 4, § 2 (emphasis added). The Act references its intent of protecting vulnerable populations’ sensitive information six times. RCW 9.35.001(2); RCW 43.17.410(1); Laws of 2017, ch. 4, §§ 2, 7, 9, 12. The

Act's intent is further supported by its title, which states it is "AN ACT Relating to the protection of seniors and vulnerable individuals from financial crimes and victimization[.]" Laws of 2017, ch. 4. Moreover, in passing the Act, voters directed that the Act be "liberally construed" to promote its purposes. *Id.* at § 12. A reasonable voter would read these provisions and title and understand they were implementing a strong public policy of protecting vulnerable individuals if approved.

Indeed, the Act's strong public policy and prohibition of disclosure is worded as strongly or stronger than prior cases where courts have found intent to apply a law retroactively. *See City of Ferndale*, 107 Wn.2d at 606 (deeming a tax exemption retroactive because farming was identified as a "central factor[]" in the state economy and the tax exemption was created "to protect" farmland); *Snow's Mobile Homes*, 80 Wn.2d at 290 (finding intent to retroactively apply tax law passed "to correct" a "particular situation"); *Fay v. Allied Stores Corp.*, 43 Wn.2d 512, 516, 262 P.2d 189 (1953) (finding intent to retroactively apply a law requiring handrails on certain stairways was "impelled" by the law's "stated object" of promoting "public health, safety, comfort, or welfare"); *Rose*, 191 Wn. App. at 858 (finding a law's declared intent "to stop treating adult marijuana use as a crime" was sufficient to invoke retroactivity and terminate pending marijuana prosecutions).

Second, the structure of the Act reflects this strong public policy because it contains two separate statutory provisions barring disclosure of Individual Provider names. The Act first creates a new PRA exemption for Individual Provider names. *See* RCW 42.56.640(1) (exempting from the PRA “[s]ensitive personal information of vulnerable individuals and sensitive personal information of in-home caregivers for vulnerable populations”). Separately, the Act flatly prohibits the state from releasing Individual Provider names by creating a new section within RCW Chapter 43.17, which is applicable to all administrative departments and agencies. RCW 43.17.410 (stating that “neither the state nor any of its agencies shall release sensitive personal information of vulnerable individuals or sensitive personal information of in-home caregivers for vulnerable populations”). The importance of protecting this information is reflected by the inclusion of these two separate prohibitions.

Third, the official State of Washington Voters’ Pamphlet from the 2016 General Election demonstrates voters’ intent to put a hard stop on disclosing personal sensitive information. Washington voters reading the Voters’ Pamphlet expected the Act to apply the moment the Act passed, as was explained in the Act’s Explanatory Statement, which was broken

down into two sections.<sup>7</sup> The first section, entitled “The Law as it Presently Exists,” explains that an “individual’s name, telephone number, and address are not considered personal information” and thus subject to disclosure under the PRA. The second, entitled, “The Effect of the Proposed Measure **if Approved**[,]” explains what changes voters should expect if the Act passed, stating: “The measure would change the [PRA] to **prohibit disclosing ‘sensitive personal information’** of both vulnerable individuals and ‘in-home caregivers of vulnerable populations. . . . It would apply to the sensitive personal information of care providers contracted by [DSHS], home care aides, and certain family childcare providers.” (emphasis added).

An average voter reading the Voters’ Pamphlet from the 2016 General Election thus understood that the Act would prohibit the State from disclosing sensitive personal information, including Individual Provider names, upon approval. *Compare League of Women Voters of Wash. v. State*, 184 Wn.2d 393, 411, 355 P.3d 1131 (2015) (relying on statements made in Official Voters’ Pamphlet to determine how voters intended an initiative to operate) *with Lynch v. State*, 19 Wn.2d 802, 812, 145 P.2d 265 (1944) (finding no intent of retroactivity from Voters’

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<sup>7</sup>See State of Washington Voters’ Pamphlet, 2016 General Election, available online at: <https://weiapplets.sos.wa.gov/MyVoteOLVR/onlinevotersguide/Measures?language=en&electionId=63&countyCode=xx&ismyVote=False&electionTitle=2016%20General%20Election%20#ososTop> (last accessed Oct. 26, 2017).

Pamphlet because the voters “were advised officially that the measure related only to future accidents and was not retroactive”).

Fourth, support for finding that voters intended the Act to apply retroactively can be found in the Supreme Court’s decision in *Godfrey v. State*. 84 Wn.2d 959, 961-62, 530 P.2d 630 (1975). There, the Supreme Court examined the effect of a statute barring the affirmative defense of contributory negligence. *Id.* Despite the statute having a clear effective date, the court determined that the significance that date as it related to retroactivity was “[n]ot clear”. *Id.* at 967. The court turned to “the purpose of the statute itself” to determine whether the Legislature intended for the law to apply retroactively. *Id.* The court recognized the significance of the Legislature’s adoption of a comparative negligence laws as “the State of Washington . . . [having a] change in public policy . . . to address [d]issatisfaction with the oversimplistic harsh concept . . . of a complete bar to recovery[.]” *Id.* Finding the statute operated retroactively, the court reasoned that it would be “incongruous indeed to frustrate this obvious legislative change in policy by adopting a position that would permit the rejected bar to recovery to continue to operat[e]”. *Id.*

Similarly, the voters passed the Act to change the State of Washington’s policy regarding sensitive personal information. As

discussed above, the Act's context as a whole reveals that voters strongly believed a change in policy to more broadly protect personal information of vulnerable individuals was needed, taking such steps as stating the Act's policy six times, ensuring that the change in policy would reside in not one but two separately codified statutes, and approving the Act with a nearly three quarters majority. Disclosing the sensitive personal information to the Seattle Times in response to its PRA request would frustrate the Act's stated intent of implementing a new public policy of protecting seniors and vulnerable individuals from identity theft and financial crimes. Laws of 2017, ch. 4, § 2.

Fifth, this Court's recent decision in *WPEA* further underscores the public policy supported by Washingtonians with respect to keeping personal sensitive information private, including names of Individual Providers. There, this Court observed that involuntary public disclosure of state employees' names associated with birthdates would "result in actual and substantial injury, will invade their constitutionally protected expectation of privacy, and will expose them to an ongoing risk of identity theft and other potential personal harms." *WPEA*, 2017 WL 4899471 at \*5. This is the exact same concern that voters expressed in enacting I-1501. Because vulnerable adults are by definition unable to protect themselves, *see* RCW 74.34.020(16), it would frustrate the voters' intent

to arbitrarily delay protections for vulnerable adults until 30 days after the Act passed, *see Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) (“[C]ourt[s] must interpret legislation consistently with its stated goals.”).

In sum, this Court should honor the voters’ intent to apply the Act to a PRA request made after voters passed the law. The Act’s stated intent is to protect the safety and security of seniors and vulnerable individuals by prohibiting the release of certain public records. As such, no average voter would believe that passing the Act merely extended the *status quo* for 30 more days, so that anyone could submit a public records request and obtain the very information voters had just declared confidential and important to protect. Accordingly, this Court should reverse and apply the Act retroactively in the narrow circumstances of a PRA request made after the Act was overwhelmingly approved by the voters.

**2. Dragonslayer is a red herring and does not control this Court’s retroactivity analysis**

Appellants anticipate that Respondents will reprise their flawed argument that the Act does not apply retroactively to the Seattle Times’ PRA request under *Dragonslayer v. Washington State Gambling Commission*, 139 Wn. App. 433, 161 P.3d 428 (2007). But *Dragonslayer*

is inapposite and does not resolve the narrow issue of whether a PRA request submitted after the Act passed applies retroactively.

In *Dragonslayer*, this Court found no legislative intent supporting retroactivity because “the legislature considered and rejected having the amendments apply retroactively.” *Id.* at 449. There, the Legislature considered a bill providing that the new PRA exemptions were “remedial and appli[ed] retroactively,” but that language was ultimately removed before the legislation was enacted. *Id.* at 448-49. In light of this direct evidence that the legislature did not intend for the statute to apply retroactively, the Court went on to consider and reject the possibility that retroactivity could be found based on the statute’s remedial purpose. *Id.* at 449. Unlike in *Dragonslayer*, here there is no indication that retroactivity was considered but rejected. And *Dragonslayer*’s discussion of whether the statute was remedial is inapposite because Appellants do not assert the Act contained a remedial purpose.

*Dragonslayer* is also factually inapposite because it did not analyze a PRA request submitted after the statute at issue was enacted. Whereas the Seattle Times slipped in its PRA request after voters approved the Act, *Dragonslayer* considered a PRA request made long before the legislature passed the potentially retroactive statute. *Id.* at 449. *Dragonslayer* thus does not control.

Even though *Dragonslayer* differs both in law and fact, Appellants further anticipate that Respondents will cite *Dragonslayer* to claim that the Seattle Times has a “vested right” to the list of Individual Provider names. Such a claim should be rejected because the language surrounding vested rights in *Dragonslayer* is dictum. The court already had determined the statute was not remedial and that the legislature did not intend for the law to apply retroactively based on the legislature’s removal of remedial and retroactivity language. *Id.*

Moreover, *Dragonslayer* did not engage in any actual vested rights analysis. *Id.* It simply stated its conclusion without support. *Id.* Indeed, *Dragonslayer* likely omitted such an analysis because the issues of vested rights and retroactivity were not properly briefed and argued. The legislation at issue in *Dragonslayer* did not pass until May 2007. *Id.* at 448. But oral argument in the case had occurred four months earlier, in January 2007, and the parties’ briefs were submitted in late 2006. CP 165 at n.2. The decision from *Dragonslayer* issued just a month after the legislation passed, without any briefing or argument from the parties. *Id.* Because retroactivity and vested rights were not properly briefed and argued, *Dragonslayer*’s language regarding vested rights is dicta.

Further, *Dragonslayer*’s extraneous vested rights statement is inconsistent with other courts’ construction of vested rights and therefore

does not defeat the Act's retroactive application. At the outset, whether a vested rights analysis even applies to cases analyzing retroactivity based on intent is not entirely clear. Although earlier decisions referenced vested rights with respect to legislative intent, *see Gillis v. King Cty.*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953), recent decisions analyzing retroactivity based on intent have not conducted a vested rights analysis, *see, e.g., Friberg*, 107 Wn.2d at 606 (mentioning vested rights only in analyzing whether the statute was remedial); *Rose*, 191 Wn. App. at 869 (interpreting whether I-502 was intended to apply retroactively without mentioning vested rights).

Regardless, even if vested rights apply, the Seattle Times has no "vested right" to Individual Provider names. Giving a law retroactive effect does not turn on "whether the law abrogates a vested right, which is merely a conclusory label." *Application of Santore*, 28 Wn. App. 319, 323-24, 623 P.2d 702 (1981) (citation omitted). Instead, as the Supreme Court has noted, vested rights implicate contracts, legal or equitable rights to title of property, or a legal demand. *See Gillis*, 42 Wn.2d at 377. As a result, "[a] vested right, entitled to protection from legislation, must be something more than a [m]ere expectation based upon an anticipated continuance of the law[.]" *Godfrey*, 84 Wn.2d at 963.

Here, the Seattle Times' PRA request is not a "vested right". First, it is well established that PRA requests, as creations of statute, do not implicate any constitutional interest and are not immune from legislation. *See, e.g., City of Seattle v. Egan*, 179 Wn. App. 333, 335, 317 P.3d 568 (2014) ("[The PRA] is a legislatively created right of access to public records. The legislature is free to restrict or even eliminate access without offending any constitutional protection."); *DeLong v. Parmelee*, 157 Wn. App. 119, 162-163, 236 P.3d 936 (2010) ("Washington courts have not held that the PRA creates a constitutional right subject to due process protections under either the state or federal constitutions."). If simply submitting a PRA request created a vested right, then no legislation—regardless of express language indicating retroactivity—could apply to a pending PRA request. Such an outcome would contravene precedent holding that PRA requests are not immune from legislation.

Second, the timing of the Seattle Times' PRA request counsels against finding a vested right. On election night, it was clear that an overwhelming majority of Washington voters had approved the Act.<sup>8</sup> Any reliance claimed by the Seattle Times is thus belied by the fact that it was on notice that the people decided to change the law. *Santore*, 28 Wn. App.

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<sup>8</sup>*See, e.g.,* Brandon Macz, *Early State, County Votes Are In*, Capitol Hill Times (Nov. 8, 2016), <http://www.capitolhilltimes.com/Content/Default/Main-news/Article/Early-state-county-votes-are-in/-3/544/4496> (last accessed Nov. 2, 2017) ("Election night results show I-1501 passing widely at 73.32 percent.").

at 323-24 (determining whether the retroactive application of a law would be unconstitutional “turns on whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectations of the parties”). The Seattle Times cannot claim the Act’s passage interfered with its reasonable expectations or interfered with its previously held position. Precisely the opposite is true—the Seattle Times only submitted its PRA request after voters passed the Act. As such, the Seattle Times has no “vested right” to the sensitive personal information voters declared confidential by passing the Act. DSHS should not be permitted to fulfill a PRA request for Individual Provider names submitted under the wire, after voters had expressed intent to protect this information.

Finally, a PRA request does not implicate any of the traditional categories of vested rights recognized by the Washington Supreme Court, *i.e.*, contracts, rights to property, or a legal demand. *See Gillis*, 42 Wn.2d at 377. Perhaps tellingly, Respondents never set forth any legal argument that the Seattle Times’ PRA request created a vested right to receive Individual Provider names. The argument is thus waived on appeal. *Curtis*, 97 Wn.2d at 68. For any and all of these reasons, *Dragonslayer* does not control here.

**D. In Addition to Exempting Sensitive Personal Information from Disclosure Under the PRA, the Act Separately Prohibits DSHS from Disclosing Individual Provider Names**

The trial court also erred in denying Appellants' motion for permanent injunctive relief because even if the Act's PRA exemption did not apply retroactively, the Act affirmatively prohibited disclosure of Individual Provider names at the time that the state planned to release the records. That is, regardless of any retroactivity analysis applicable to a PRA exemption, RCW 43.17.410 does not allow DSHS to release Individual Provider names—period.

The Act proclaims in no uncertain terms that “**neither the state nor any of its agencies shall release** sensitive personal information of vulnerable individuals or **sensitive personal information of in-home caregivers** for vulnerable populations[.]” RCW 43.17.410 (emphasis added). Individual Providers, by statutory definition, fall in this category of caregivers. RCW 42.56.640(2)(a). RCW 43.17.410 thus affirmatively and unambiguously prohibits all state agencies from disclosing Individual Provider names. Subject to limited exceptions not applicable here, this prohibition is absolute. RCW 43.17.410's broad prohibition applies regardless of whether a PRA request is involved. No retroactivity analysis is required because the Act forbade DSHS from releasing the names of

Individual Providers as soon as it went into effect on December 8, 2016. Retroactivity simply does not apply to this affirmatively prohibitive language.

The Act's statutory prohibition is true today and it was true when DSHS initially intended to release the names after the close of business on December 9, 2016. This Court should reverse on this basis as well.

## **VI. CONCLUSION**

Under this Court's recent holding in *WPEA*, DSHS is prohibited from fulfilling the Seattle Times' PRA request for Individual Provider names associated with birthdates. Further, Washingtonians overwhelmingly passed the Act to protect the safety and security of seniors and vulnerable individuals. The Act's strong public policy is served by applying the Act to a PRA request made after the Act passed, but before its technical effective date. The Act also separately and affirmatively prohibits the state from providing the requested information today. For any or all of these reasons, Appellants respectfully request this Court reverse and permanently enjoin DSHS from releasing Individual Provider names and birthdates.

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RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of November, 2017.

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